



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 93 OF 2020

PAUL MUHORO MURIITHI.....APPELLANT

-VERSUS-

JARED INDA OGUTU.....RESPONDENT

RULING

The Applicant filed a Notice of Motion dated 16th November, 2020 under the provisions of Article 159(2) (d) of the Constitution, 2010, Section 1A, 1B and 3A of the Civil Procedure Act, Cap 21 Orders 22 Rule 22, Order 42 Rule 6, Order 50 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules, 2010 and all other enabling provisions of the law seeking the following orders;

a. Spent

b. THAT pending the hearing and determination of this Application and the Appellant/Applicant's intended Appeal, there be a Stay of Execution of Hon. A. N. Makau (MS) (Principal Magistrate's) Judgment delivered on 14th June, 2018.

c. THAT the costs for the Application abide the outcome of the Intended Appeal.

d. Any other Order that this Honourable Court deems fit.

The application is premised on the grounds on the face of the application and the supporting affidavit of Paul Muhoro Muriithi, sworn on 13th November 2020 and a supplementary affidavit sworn on 14th December, 2020. The Respondent opposed the application through a Replying Affidavit sworn on 4th December, 2020 by **Salome Muhia Beacco**, Advocate for the Respondent herein. On 20th January, 2021 parties agreed to have the application canvassed by way of written submissions. The Applicant and the Respondent filed their submissions dated 15th March, 2021 and 19th March, 2021 respectively.

The Appellant being aggrieved by the decision of Hon. A.N. Makau(Ms), (Principal Magistrate) dated 30th January, 2020 in Milimani Chief Magistrate's Court Case No. 6232 of 2017 dismissing his application dated 8th November, 2019 seeking inter alia stay of execution of the court's judgment dated 14th June, 2018 and all the consequential orders has lodged an appeal by filing a Memorandum of Appeal dated 26th February, 2020 and later the present application. It is the Applicants' contention that the appeal, if successful, will be rendered nugatory and that he will suffer irreparable damage if execution is not stayed. The Applicant deposes that the Respondent has not disclosed evidence to prove her financial standing. The Applicant aver that he is willing to deposit security for due performance of the decree and that the Respondent shall not suffer any prejudice if the application is allowed as it is brought in good faith.

The Applicant submits that the issue for determination before the court is whether the Applicant has satisfied the condition for grant of stay of execution set out under Order 42 Rule 6 of the Civil Procedure Rules, 2010 and relies on the case of **Paul Kamura Kirunge v John Peter Nganga[2019]eKLR** and that of **Charles Kariuki Njuri v Francis Kimaru Rwaru (Suing as Administrator of Estate of Rwaru Kimaru alias Benson Rwaru Kimaru-Deceased)[2020]eKLR** where the court reiterated the criteria for issuance of order for stay of execution to include whether the applicant will suffer substantial loss, whether the application has been made without unreasonable delay and security for due performance of the order. The courts further highlighted the importance of preserving the subject matter in dispute so as to ensure that the right of the appellant, if successful, is not rendered nugatory. Further reference has been placed on **G.V Odunga's Digest on Civil Case Law and Procedure, 2006 at page 733** and **Sudipo Sarkar's Sarkar's Law of Civil Procedure, 1992**.

On whether the Appellant will suffer substantial loss, it is submitted that he has proved that he will suffer loss and that the loss will be substantial. This is informed by the fact that the Respondent has already instructed **Thames Traders Auctioneers** to institute execution proceedings against the Applicant who have already served warrants of attachment and sale. The Appellant is also apprehensive that if the sale proceeds, there is no guarantee that the Respondent will refund the amount realized from the sale if the appeal is successful. To this end the Appellant has relied on the case of **Kartar Singh Dhupar & Company Limited vs Mau West Limited[2020]eKLR** and that of **Paul Kamura Kirunge v John Peter Nganga(Supra)**. It is the Appellant's submission that the Respondent's failure to prove his ability to refund the decretal amount is an indication that he is not financially capable and referred to the case of **Magnate Ventures v Simon Mutua**

Mwatha[2018]eKLR where Kamau J. held that where there is an apprehension on the Respondent financial ability to refund the decretal amount, the burden of proof shifts to the Respondent. A similar position was taken in the case of **Momul Tea Factory v Rent A fine Car Limited & Another[2018]eKLR**.

The Applicant submits that the apparent delay in filing the present application was occasioned by the downscaling of court operations due to Covid-19 in March, 2020. Although acknowledging the delay, the Applicant contends that the court in determining delay should be guided by the unique circumstances of each case. This was the court's holding in **Board of Trustees Anglican Church of Kenya v Nasibo Ibrahim Abdi & 3 Others[2018]eKLR** and in **Eric Macharia Kiguoya vs Jubilee Insurance Company of Kenya Limited[2018]eKLR**. The Applicant while acknowledging the essence of security as elucidated in the case of **Arun C. Sharma vs Ashana Raikundalia t/a Raikundalia & Co. Advocates[2015]eKLR** has further submitted that he is willing to furnish security of at least half of the decretal sum pending the determination of the appeal.

In opposition to this application, it is deponed on behalf of the Respondent that the Applicant has not satisfied the mandatory conditions for an order of stay as envisaged under Order 42 Rule 6 of the Civil Procedure Rules, 2010. The Respondent argues that the Applicant has failed to issue security for performance and that he has failed to specifically demonstrate the loss that he would suffer should execution proceed. It has been further argued for the Respondent that Ten (10) months delay in filing the present application after the lower court ruling is unreasonable and inordinate and that no valid reason has been given. The Respondent argues that litigation must come to an end and that the present application is a ploy to delay his right to enjoy the fruits of his judgment bearing in mind he is in dire need of the money for treatment.

The Respondent in his submissions reiterated that the present application was an afterthought and has been brought after unreasonable and inordinate delay to deny the Respondent immediate access to the fruits of his judgment. The Respondent referred to the case of **Machira t/a Machira & Co. Advocates [2002]eKLR** where the court held that the ordinary principle is that a successful party is entitled to the fruits of his judgment or of any decision of the court giving him success at any stage. On what constitutes substantial loss, the Respondent submitted that the applicant has failed to show how he will suffer loss and relied on the case of **James Wangalwa & Another vs Agnes Naliaka Cheseto[2012]eKLR** where Gikonyo J. opined that the burden of proof lies with the Applicant seeking orders for stay and that the process of stay in itself does not amount to substantial loss since it is a lawful process.

The Respondent while relying on the case of **Masisi Mwiti vs Damaris Wanjiku Njeri [2016]eKLR** has submitted that the Applicant has neither offered nor proposed any security for due performance and as such the application should be dismissed with costs. Further, the Respondent asserts that the appeal will not be rendered nugatory if stay is not granted because the present appeal is with regards to money decrees where one can sue for recovery as was held by the Court of Appeal in the case of **Kenya Shell Ltd vs Benjamin Karuga Kibiru & Another [1986]eKLR**. The Respondent has further urged the court to balance the competing interests of the parties; right of the Applicant to be heard and the right of the Respondent to have security of costs. To buttress this position, the Respondent has relied on the case of **Absalom Dova vs Tarbo Transporters[2013]eKLR** and **Patrick Ngeta Kimanzi vs Marcus Mutua Muluvi & 2 others[2013]eKLR**. The Respondent further submits that the present application is an abuse of the court process and that the same should be dismissed for failing to meet all the requirements under Order 42 Rule 6.

Analysis/Determination:

The present application invokes the discretionary powers of the court which must be exercised judiciously. It is brought under Order 42 Rule 6(1) of the Civil Procedure Rules, 2010 that empowers this court to stay execution, either of its judgement or that of a court whose decision is being appealed from, pending appeal. The conditions to be met before stay is granted are provided for under Rule 6(2) of Order 42 and states as follows:

“No order for stay of execution shall be made under sub rule (1) unless–

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”

The Court of Appeal in **Butt v Rent Restriction Tribunal [1982] KLR 417** gave guidance on how a court should exercise discretion and held that:

“1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.

3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.

4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.

5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”

The Memorandum of Appeal was filed on 26th February, 2020 and the Appellant/Applicant application for stay was filed on 16th November, 2020 this was after being served with warrants of attachment dated 16th September, 2020 from Thames Traders Auctioneers. The appellants have submitted that the delay in prosecuting the Appeal was occasioned by the suspension of court operations due to Covid-19 and the directives thereafter. There is evidence on record to show that the Applicant herein took steps to follow up the Appeal with the court registry, this court is therefore convinced that the application is not an afterthought.

In the Court of Appeal case of *Nairobi Civil Application No. 238 of 2005 National Industrial Credit Bank Limited v Aquinas Francis Wasike & another (UR)* as cited by the High Court in *Stanley Karanja Wainaina & another v Ridon Anyangu Mutubwa [2016] eKLR* it was held;

“This court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a Respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a Respondent or lack of them. Once an applicant expresses a Respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the Respondent to show what resources he has since that is a matter which is peculiarly, within his knowledge.”

In the case at hand, the Respondent has not disclosed any source of income that she would use to refund the Applicant’s half of the decretal amount should the appeal succeed, I am satisfied that the Applicant has established that it will suffer substantial loss if the intended execution is not stayed. It also follows that if the Respondent executes the judgement and the Applicant’s appeal succeeds, then not only will the Applicant suffer substantial loss but the appeal will also be rendered nugatory. The Applicant has indicated his readiness to furnish at least half of the decretal sum as security for the due performance of the decree pending the hearing and determination of the appeal.

As to whether the appeal has high chances of success, the Applicant alleges that the magistrate erred in misconstruing and misrepresenting the law relating to service of court process on an agent. These issues would best be determined in the appeal. In the circumstances, I do find the application dated 16th November, 2020 merited and the same is granted as prayed subject to the Applicant depositing Kshs.600,000 either in court or joint interest earning account of both advocates within sixty (60) days hereof. The Applicant will also settle the auctioneers costs, to be paid within sixty (60) days hereof. The costs of the application shall abide the outcome of the appeal.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 6TH DAY OF JULY 2021.

.....

S. CHITEMBWE

JUDGE